IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Suva

CRIMINAL APPEAL AAU 0163 OF 2020
[Lautoka High Court No: HAC 067 of 2019]

BETWEEN : **TIMOCI VUKI DAWAI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**
Andrée Wiltens, JA
Rajasinghe, JA

Counsel : **Appellant in Person**
Seruvatu S for the Respondent

Date of Hearing : **14 May, 2025**
Date of Judgment : **29 May, 2025**

JUDGMENT

[1] The appellant had been charged with three counts (he pleaded guilty to one count and after trial was convicted on the others under the Crimes Act 2009 in the High Court at Lautoka for having raped his eldest biological daughter of 11 years ('SM') in 2008 on a representative count and committed indecent assault on another biological daughter of 19 years (AD) in 2019. The charges were as follows:

*"**FIRST COUNT***
(Representative Count)

Statement of Offence

***RAPE**: Contrary to section 149 and 150 of the* Penal Code*, Cap 17.*

Particulars of Offence

***TIMOCI VUKI DAWAI** between the 1st day of January, 2008, and the 31st day of December, 2008 at Nadi in the Western Division, had unlawful carnal knowledge of "SM" without her consent.*

SECOND COUNT

Statement of Offence

***INDECENT ASSAULT**: Contrary to section 212(1) of the Crimes Act 2009.*

Particulars of Offence

***TIMOCI VUKI DAWAI** on the 21st of March, 2019 at Nadi in the Western Division, unlawfully and indecently assaulted "AD".'*

[2] The appellant had earlier pleaded guilty to another representative count of indecent assault on the same eldest daughter - SM (as follows):

*'**Representative count***

Statement of Offence
***INDECENT ASSAULT**: Contrary to section 154(1) of the Crimes Act 2009.*

Particulars of Offence

***TIMOCI VUKI DAWAI** on between the 1st day of January, 2008, and the 31st day of December, 2008 at Nadi in the Western Division, unlawfully and indecently assaulted "SM" by touching her breast and her vagina.'*

[3] The High Court judge on 20 September 2020 sentenced him to an aggregate period of 18 years imprisonment (effective period being 16 years, 5 months and 25 days after the remand period was discounted), with a non-parole period of 15 years.

[4] The appellant's appeal against conviction and sentence was timely.

Leave to Appeal Hearing

[5] The appellant submitted a Notice of Motion for Leave to Appeal pursuant to section 21(1)(b) and (c) of the Court of Appeal Act against conviction and sentence. There were 7 grounds of appeal against conviction and 1 against sentence. In the Ruling dated 24 June 2024, all these grounds were carefully reviewed against relevant legal principles and case law by the single judge and at the end of the hearing he refused leave to appeal on all grounds against conviction. He granted leave to appeal against sentence.

[6] I have carefully reviewed the Court Record submitted for this appeal and also the Court File from the Registry to determine if a Renewal Application had been submitted by the appellant. The record will show that following the single judge ruling in **Timoci Vuki Dawai v State [2024] FJCA (AAU 163 of 2020)** on 24 June 2024, the only filing made after that and dated 22 April 2025 was referenced as: Amended Grounds of Appeal. This filing is 11 months not 30 days out of time. There is no enlargement of time application to submit the renewal application.

[7] This is in clear violation of **Practice Direction No. 4 of 2019** which states at paragraph 4; [for Criminal Appeals]

> *"In default of a party failing to file and serve a renewed application for leave to appeal or a renewed application for an enlargement of time within 30 days of the date of the pronouncement of the decision refusing the application, the appeal shall be dismissed pursuant to the inherent power of the Court to avoid abuse of process."*

[8] In **Korodrau v State [2019] FJCA 193 (AAU 090 of 2014**) the court states:

> *"[5] It appears that there is no written renewed application available in the copy record provided to this court. Consequent to leave to appeal ruling, the respondent has filed written submissions dated 13th August 2019 and stated inter alia that the appellant had stated that he would only proceed with the 08th ground of appeal against conviction allowed at the leave stage and the two grounds of appeal against sentence. The appellant in his submissions in reply received by the registry on 23 August 2019 has confirmed that he had informed court that he would only pursue the grounds for which*

leave had been granted. The appellant reiterated this position orally at the hearing into the appeal.

[7] The appellant had also filed a new set of grounds of appeal on 05 August 2018 and written submissions on them on 05 August 2019. At the hearing the state counsel admitted having received the same but not replied to those grounds as they had not been raised within 30 days of the date of leave to appeal ruling on the basis of Practice Direction No.4 of 2019 read with Practice Direction No.3 of 2018 both of which require any renewed application to be filed within 30 days of the date of pronouncement of the decision of the single Judge refusing leave to appeal. In addition, Practice Direction No.4 of 2019 makes provision for the appeal to be dismissed pursuant to the inherent power of court to avoid abuse of process in the event of default of a party to adhere to the time frame of 30 days stipulated for filing and serving the renewed application on the other party.

*[8] However, this Court was of the view that the said direction in the Practice Direction No.4 of 2019 would not apply to a situation where an appellant raises new grounds of appeal after the leave to appeal ruling but before the appeal hearing as such grounds cannot be regarded as renewed grounds. Rule 37 of the Court of Appeal Act on the 'Amendment of notice of appeal' too would not come to the rescue of an appellant when totally new grounds are sought to be urged before the full court (vide: **Rokodreu v State** AAU0139 of 2014: 29 November 2018 [2018] FJCA 209). The state counsel sought time to file written submissions on the new grounds of appeal and did so on 17 September 2019. The appellant informed this Court that he would rely on his written submissions regarding the new grounds of appeal. He made oral submissions on the single ground of appeal against conviction and his application to lead fresh evidence and stated to court that he would rely on his written submissions on the two grounds of appeal against sentence."*

[9] It is clear from the above review of applicable law that applies to the facts in this case, the failure of the appellant to renew his application for appeal, deprives the full court of jurisdiction to hear the appeal against conviction because leave was refused by the judge alone at the leave to appeal hearing. The appeal against conviction is therefore dismissed for lack of jurisdiction.

Appeal Against Sentence

[10] Leave to appeal against sentence was granted by the single judge in his Ruling during the Leave to Appeal Hearing. The appellant does not need to submit a renewed

application before the full court for the review of the sentence. The sentence will now be reviewed.

[11] In sentencing the appellant following the trial in the High Court and after reviewing the sentence ruling, we are satisfied that all the relevant legal principles were applied and in the circumstances of the case. At the leave to appeal hearing, the single judge ruled that the full court may review the sentence, especially in the absence of reasons being given by the trial in the selection of the starting point of 13 years. At the hearing before the full court and having regard to the facts of the case in the court record and in light of the Respondent submissions, it was not reasonable to accept the appellant submission, that the sentence was harsh and excessive.

[12] The court reviewed the selection of the starting point of the sentence and was satisfied that 13 years was supportable on the facts, and the consideration of the aggravating and mitigating factors was not excessive. As was held in **Koroicakau v State [2006] FJSC 5 (CAV 006 of 2005S),** the Supreme Court stated:

> *"It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process."*

The approach taken by the appellate court in an appeal against sentence is to assess whether in the circumstances of the case the sentence is one that can reasonably be imposed by a sentencing judge. In **Sharma v State [2015] FJCA 178 (AAU 048 of 2011**) the Court of Appeal stated the following:

> "[*45]* *In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the*

> *exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range. However, it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust."*

[13] We accept the Respondent's submission that the circumstances of this case was that the appellant raped his oldest biological daughter age 11 years old (SM) on two occasions in 2008 and indecently assaulted her on several occasions by touching her breasts and her vagina. As well, he indecently assaulted a second daughter (AD) in 2019. The sentence was within the tariff of 11-20 years, set by the Supreme Court in **Aitcheson v State [2018] FJSC 29 (CAV 0012 of 2018)** for rape of a young person. The additional indecent assaults are aggravating. The sentencing judge's discretion in this case is not miscarried given the circumstances of the case.

[14] The appellant's appeal against sentence for the reasons discussed above has no merit and is dismissed**.**

ORDERS:

1. Appellant's appeal against conviction is dismissed for lack of jurisdiction.
2. Appellant's appeal against sentence is dismissed.

The Hon. Mr Justice Isikeli Mataitoga
PRESIDENT OF THE COURT OF APPEAL

COURT OF APPEAL FIJI

The Hon. Mr Justice Andrée Wiltens
JUSTICE OF APPEAL

The Hon. Mr Justice Thushara Rajasinghe
JUSTICE OF APPEAL